

HEALTH CARE CONSTRUCTION SUMMIT II

Monday, September 22, 2008

California Science Center, Los Angeles, CA



Best Practices in Healthcare Facility Construction

What a Good Subcontractor Pays Attention to in Contracting

#1 Acceptable Levels of Risk – Good SUBS Look for Contracts Which Distribute Risk and Liability in a Fair Manner Amongst ALL Entities on the Jobsite

The fact is things go wrong on jobsites. When they do they can be costly. Sometimes the problems can be related to the scope of work under your company's contract; and sometimes the problems are related to work performed by others. Good subcontractors (SUBS) make sure the contracts they sign are fair and don't hold their company liable for the work or mistakes of others. Betting their company or home "just to get the job" is not a sustainable practice and should be discouraged.

A good general contractor (GC) is dedicated to maintaining a safe and productive working environment. GCs will take extraordinary efforts to protect their company, streamline response times and reduce their costs dealing with any problems that may arise on the jobsite. To this end, some GCs will include specific provisions in their contracts with subcontractors (SUBS) that require the SUBS to indemnify the GC and the owner, including the cost to defend, against all liability for claims of damages, personal injury, construction defects, and defects in design (even if these relate to the negligence of the builder or the builder's other agents, other servants, or other independent contractors).

Best Practice #1

A good SUB carefully reviews the contract language provided to them by the GC and determines the full range of risk and liability being shared or transferred to the subcontractor. If the SUB cannot purchase adequate insurance to cover all of the liability and are uncomfortable with the level of risk posed to themselves and their company, it is good practice for the SUB to re-negotiate these contractual terms with the GC or look for another project with a more acceptable contract.

#2 Ensuring Prompt Payment – Good SUBs Anticipate and Protect Themselves Against the Costs of Delayed Payment

GCs have an enormous responsibility to ensure the owner receives the facility they expect. GCs need to make sure the SUB has performed their job in a satisfactory manner and met the expectations in their agreement prior to releasing payment.

SUBs expect to get paid for the work they perform. Labor and materials are expensive and can only be carried by the SUB for so long before wreaking havoc on the cash flow of their company. The expectation of prompt payment extends to the primary work under contract as well as any change orders that might be added later.

Healthcare facility construction is unique and sometimes complicated with OSHPD review and design approvals that can lead to substantial extra work which consumes more time. The result can sometimes lead to significant delays in payment for work performed by SUBs.

Best Practice #2

A good SUB will anticipate these prompt pay issues and do one of two things:

1. Build-in to their bid their actual cost of borrowing capital to finance their portion of the job, or;
2. Negotiate contractual terms with the GC which include the following:

All contract provisions related to payment shall include by reference the GCs full compliance with prompt pay statutes included in Civil Code Sections 3260-3260.1 and Business and Professions Code Section 7108.5; and

The contract include an expedited change order process with specific deadlines for the owner's response to RFIs, requests for clarification, and change requests. Terms could also include an expedited resolution process for change order work that allows the subcontractor to be included in the GCs negotiations with the owners relating to change requests and other claims, so that the subcontractor is not left out of the loop, and is able to fully represent its interests.

#3 Protection Against Payment Claims by Tier Subcontractors and Suppliers

A good SUB pays their tier subcontractors and suppliers on a timely basis. The correctly GC relies upon the SUB to make these payments. It is unacceptable for a GC to be forced to take upon themselves the risk and costs to the project associated with a claim asserted by a tier subcontractor or supplier that has not been paid by the primary SUB.

To protect themselves against this, some GCs will require their SUBs to be contractually liable for liens, stop notices, or claims asserted by tier subcontractors and suppliers. This works fine until the GC is unable to pay the SUB for the work and supplies requested by the GC and/or owner. Despite the lack of payment, the SUB is then held legally responsible for the non-payment to their tier subcontractors and suppliers.

Best Practice #3

A good SUB will protect themselves from these types of situations by negotiating in their contracts with the GC that all relevant contract clauses between the GC and SUB provide that the SUB's liability to tier subcontractors and suppliers shall only arise where the SUB has already been paid for the work and supplies in question.

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